89-934

No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1989

MARIE WOODARD, ET AL., *Petitioner*

vs.

CITY OF FORT WORTH, TEXAS, *Respondent*

Petition for Writ of Certiorari to the Supreme Court of Texas

DUSHMAN & FRIEDMAN, P.C.
JACK FRIEDMAN
2620 Airport Freeway
Fort Worth, TX 76111-2330
Attorneys for Petitioners

Fort Worth Brief Printing Co., 610 South Jennings Avenue, Fort Worth, Texas 76104 - Phone 817-332-4000

QUESTION PRESENTED

1. Whether pervasive negligent practices which amount to official policy can give rise to a cause of action under 42 USC, Section 1983, against a municipality, by or on behalf of persons injured or killed thereby?

LIST OF PARTIES

Petitioner: Marie Woodard; Sherry L. Milton, minor; Tonya M. Milton, minor; Sara J. Fletcher, minor; The Estate of Peggy Ann Milton, Deceased; Gertie Conner Suiters; Dionne M. Milton, minor; Frankie G. Milton, minor; Billy Don Milton; Estate of Sara Jane Milton; Freida Mosley Milton, minor; Don Milton, minor; Latoya Milton, minor; Billy Ray Johnson; Dale Ray Howard; Oron Murphy; James Runsheimer, Guardian and Administrator; Cornetta Allen, N.C.M.; The Estate of Elizabeth Allen, Deceased; Beverly Beatrice Allen; Edward Lee Allen.

Respondent: City of Fort Worth, Texas

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No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1989

MARIE WOODARD, ET AL, *Petitioner*

vs.

CITY OF FORT WORTH, TEXAS, *Respondent*

Petition for Writ of Certiorari to the Supreme Court of Texas

Petitioner respectfully prays that a writ of certiorari issue to review the September 13, 1989 decision of the Texas Supreme Court which allowed the summary judgment of the trial court to stand and allowed as well the affirmance of the trial court's judgment by the Texas Court of Appeals.

OPINION BELOW

The order of the 153rd Judicial District Court of Tarrant County, Texas, is not reported. It is reprinted in the appendix to this petition.

The opinion of the Court of Appeals for the Second Supreme Judicial District of Texas is not reported. It is reprinted in the appendix to this petition.

The Supreme Court of Texas has denied this Petitioner's application for a writ of error with the notation, writ

denied, and has denied Petitioner's motion for rehearing by order dated September 13, 1989. The notices received from the Clerk of the Supreme Court reflecting these actions are reprinted in the appendix to this petition.

JURISDICTION

The jurisdiction of this court is invoked under 28 USC, Section 1257(3), which provides that this court may, by writ of certiorari, review any final judgment or decree rendered by the highest court of the state in which a decision could be had, where any title, right or privilege or immunity is specially set up or claimed under the Constitution, treaties or statutes of, or commission held or authority exercised under, the United States.

Judgment of the Supreme Court of Texas sought to be reviewed is its refusal to grant a writ of error. Writ was denied on the 21st day of June, 1989, and Petitioner's motion for rehearing was overruled on September 13, 1989. Said judgment became final, (Rule 133 and 134, Texas Rules of Appellate Procedure) and is now appealable.

The Supreme Court of Texas is the highest court of Texas in which a decision could be had in said cause; and at every level the Petitioner specially set up and claimed a right under a statute of the United States, namely 42 USC, Section 1983, and derivative to the rights to life and liberty guaranteed by the Fifth and Fourteenth Amendments of the Constitution of the United States. It is clear that the decision of the state courts under this federal statute and constitution "are not in accord with applicable decisions of this court."

STATUTORY AND CONSTITUTIONAL PROVISIONS INVOLVED

Amendment XIV, Section 1 of the United States Constitution:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Amendment V of the United States Constitution:

> No person shall be . . . deprived of life, liberty, or property, without due process of law . . .

42 USC, Section 1983, Civil Action for Deprivation of Rights:

> Every person who, under color of any statute, ordinance, regulation, custom or usage of any State or Territory or the District of Columbia, subjects, or causes to be subjected any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

STATEMENT OF THE CASE

This is a wrongful death, survivor action and personal injury suit arising from a liquefied petroleum gas explosion. The City of Fort Worth was responsible for the proper inspection and timely re-inspection of these premises but failed to do either. The city inspector nevertheless issued a certificate permitting the use of the premises which was relied upon by the Petitioners. Suit was brought against the City of Fort Worth after the explosion and deaths alleging both state and federal causes of action. The state trial court held that there was no duty under existing Texas tort law between the inspector of a dangerous condition and a third party relying on such inspection, as that duty was described in the Restatement of Torts (Second), Section 324A. The Court of Appeals and Texas Supreme Court likewise refused to extend Section 324A of the Restatement of Torts (Second) to Texas law. That cause of action under state law is not a part of this appeal.

The trial court dismissed the federal claim brought specifically under 42 USC, Section 1983, and in essence held that Petitioner's pleadings failed to state a claim of action upon which relief could be granted. The Court of Appeals characterized Petitioner's allegations as mere "negligence" and therefore denied the applicability of 42 USC, Section 1983.

Contrary to such characterization, Petitioner's federal action is in fact grounded upon allegations of widespread practices, some negligent and others intentional, that amounted to municipal policy and evidenced deliberate indifference to the rights of those injured and killed in

the explosion. Consequently, these pleadings do state a cause of action upon which relief could be granted under 42 USC, Section 1983, and Petitioners should have the opportunity to prove their case under that standard.

HOW THE FEDERAL QUESTION WAS PRESENTED

The cause of action under 42 USC, Section 1983, was properly raised at every available stage of the legal proceedings. It was part of the pleadings and was raised in each appellate level court in Texas. The trial court rejected outright the Petitioner's allegations and held that the petition failed to state a claim or cause of action upon which relief could be granted. The Court of Appeals rejected the federal cause of action holding that constitutional rights protected by Section 1983 are never implicated by negligent governmental activity. Finally, the Supreme Court of Texas refused to exercise its jurisdiction to review this matter thereby allowing the Court of Appeals decision to stand.

REASONS FOR GRANTING THE WRIT

I.

PERVASIVE NEGLIGENT PRACTICES WHICH AMOUNT TO OFFICIAL POLICY CAN GIVE RISE TO A CAUSE OF ACTION UNDER 42 USC, SECTION 1983.

This lawsuit arises from a liquefied petroleum gas explosion that caused several deaths and serious injuries. The cause of the explosion was a defective underground tank which was supposed to have been inspected by the Fort Worth city inspectors. In fact, the city

inspector at the time of this inspection was physically incapable of handling the normal routine, had previously been disciplined for issuing a certificate without making an inspection and by admission of his superiors probably did make a negligent inspection at the time in issue. Additionally, the city was required by its own regulations to have returned for one or more additional inspections, but never did. Further evidence showed that the head of the fire inspection division had previously advised the Fort Worth City Council of understaffing problems and the fact that sooner or later someone would be killed or seriously hurt as a result of the inability to inspect buildings, such as this one, adequately. Despite this clear warning, the highest officials of the city chose to face that risk and expose the public to unnecessary, serious danger. Thus, the summary judgment evidence presented below clearly sets out a widespread and persistent practice of the City of Fort Worth that was actually known to the highest city officials and was probably tantamount to official city policy. *Bordanaro v. McLeod*, 871 F.2d 1151 (1st Cir. 1989).

The Texas courts in this case have denied liability on the basis that constitutional rights protected by Section 1983 are not implicated by merely negligent governmental activity. The lower courts purport to rely upon this court's decision in *Daniels v. Williams*, 474 U.S. 327, 106 S.Ct. 662, 88 L.Ed.2d 662 (1986). But, unlike *Daniels*, this case involves actual knowledge of the highest city authorities as well as pervasive practices which constitute a deliberate indifference to the rights of those who were injured and killed. The instant cause is ruled by this court's more recent decision in *Canton v. Harris*, 489

U.S. ____ , 103 L.Ed.2d 412, 109 S.Ct. 1197 (1989). Although it is true that the due process clause of the United States Constitution's Fourteenth Amendment does not transform a singular tort committed by a state into a constitutional violation, the governmental unit may be held liable under that section for violations of rights guaranteed by the Constitution where such violations result, as they did here, from the failure to adequately train its employees, supervise its employees, or provide adequate staffing, so long as that failure reflects a deliberate indifference on the part of the governmental unit to the constitutional rights of its inhabitants.

In *Monell v. New York City Dept. of Social Services*, 436 U.S. 658 56 L.Ed.2d 611 98 S.Ct. 2018 (1978), this court held that a municipality can be held liable under Section 1983, not under theories of respondeat superior, but where the municipality itself causes a constitutional violation. Official policy may be inferred from informal acts or omissions of supervisory municipal officials. *Turpin v. Mailet*, 619 F.2d 196 (2nd Cir. 1980). Because the City of Fort Worth had actual knowledge of the inadequacies of its staff and the inabilities of the staff to provide adequate or timely inspections and because the City of Fort Worth's highest officials had been specifically warned that death or serious injury would likely occur as a result of these inadequacies, it is clear that the continual negligence in its inspection division was a municipal policy or custom. The question then is whether such inadequacy of this inspection procedure amounted to a deliberate indifference of the rights of those affected by it. The city, at its highest level of authority, had both actual and constructive knowledge of these practices and

consciously refused to remedy them. Accordingly, the City of Fort Worth should be held liable; its inspection inadequacies reflect a "deliberate" or "conscious" choice by the city. Under the rule of *Canton v. Harris*, supra, this Petitioner must still establish at the time of trial that the inadequacy of the program is closely related to the ultimate injury.

It is true, as the courts below have stated, that Section 1983 claims generally apply only to deliberate or conscious activity on the part of the municipality. Consequently, merely negligent deprivations of constitutional rights do not amount to a deprivation that would be actionable under Section 1983. A single act of ordinary negligence obviously cannot ordinarily form the basis of a civil rights claim. *Daniels v. Williams*, supra. But, this Petitioner alleges more than a single act of negligence on the part of the Respondent. The inspector was guilty of negligence in the inspection that he did make. The inspector failed to return for a proper inspection contrary to the city's requirements. The city was negligent in allowing an inspector who was physically unfit to carry out the functions that he was attempting to do. The city was also negligent in failing to provide sufficient manpower to inspect properly and often enough. The city was also negligent in failing to require adequate and timely inspections in the face of a specific warning of probable injury or death as a result of the continuation of these policies. We believe that the separate incidents, repeated failures to perform legally mandated duties, repeated failures to take preventive action and repeated negligence rise to the level of "deliberate indifference" to an affirmative duty and would accordingly be actionable

under Section 1983. *Doe v. New York City*, 649 F.2d 134 (2d Cir. 1981); *Pagano by Pagano v. Massapequa Public Schools*, 714 F.Supp. 641 (E.Dist. of NY 1989).

II.

THE RIGHT TO LIFE IS A FUNDAMENTAL RIGHT GUARANTEED BY THE FIFTH AND FOURTEENTH AMENDMENTS AND A VIOLATION OF SUCH RIGHT FALLS WITHIN THE PROTECTION OF 42 USC, SECTION 1983.

The City of Fort Worth, in the person of its city council, had been warned personally by its highest officials that serious injury or death would occur by reason of numerous inadequacies in its inspection department. Despite those warnings, the City of Fort Worth consciously chose to allow the negligence to continue, thus bringing about exactly what had been predicted. Important constitutional rights are invaded when innocent victims are maimed, horribly scarred or killed. The right to life and liberty is a fundamental right guaranteed by the Fifth Amendment to the Constitution and applied to actions of state by the Fourteenth Amendment to the Constitution. A cause of action brought to redress the violation of these rights states a cause of action under 42 USC, Section 1983. *Landrum v. Moats*, 576 F.2d 1320 (8th Cir. 1978). These Petitioners have clearly identified persistent and pervasive actions by the City of Fort Worth, consciously chosen by it, that have become its custom and policy. This policy has caused the Petitioners to be deprived of constitutional rights guaranteed by the Fifth and Fourteenth Amendments to the Constitution

and they should be given the right to pursue such cause of action under Section 1983. *Palmer v. City of San Antonio*, 810 F.2d 514 (5th Cir. 1987).

CONCLUSION

For the reasons stated and discussed, it is respectfully submitted that pervasive negligent practices which amount to official policy may give rise to a cause of action under 42 USC, Section 1983, against a municipality and, therefore, Petitioners pray for a writ of certiorari directed to the Supreme Court of Texas to review the judgment of that court, along with the judgments of the courts below, and that upon the granting of a writ of certiorari in this cause, that this court reverse the judgments below with directions that the Petitioners herein be granted a new trial.

Respectfully submitted,

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817-834-8851

By: _____
Jack Friedman
Bar ID#: 07466500

Attorneys for Petitioners

APPENDIX

IN THE DISTRICT COURT
OF TARRANT COUNTY,
TEXAS 153RD JUDICIAL DISTRICT

No. 153-77312-83

MARIE WOODARD, ET AL

VS.

CITY OF FORT WORTH

FINAL ORDER OF SUMMARY JUDGMENT

On this date the Court heard Defendant's Motion to Reconsider Order Granting Partial Summary Judgment and the Court having heard the argument of counsel is of the opinion that the Order granting Partial Summary Judgment should be set aside and that having reconsidered the pleadings, including Plaintiffs' Third Amended Original Petition, the summary judgment evidence and having considered again the arguments and briefs submitted by counsel, finds and concludes:

1. The record as a whole conclusively demonstrates as a matter of law that the Defendant City of Fort Worth, in conducting or failing to conduct an allegedly proper fire inspection, was at all material times engaged in the performance of a governmental function as that term is defined in the Texas Tort Claims Act. Therefore, there are no genuine issues of material fact regarding Plaintiffs' First Claim for Relief under their common law cause of action under "proprietary function" and Defendant, City of Fort Worth, is entitled to

judgment on Plaintiffs' First Claim for Relief as a matter of law.

2. The record as a whole conclusively demonstrates as a matter of law that the City of Fort Worth owed no duty to Plaintiffs under the Texas Tort Claims Act or Section 324A of the Restatement (2nd) of Torts as a result of undertaking to provide a fire inspection. Therefore, the Defendant, City of Fort Worth, is entitled to judgment on the Plaintiffs' Second Claim for Relief as a matter of law.

3. The record as a whole conclusively demonstrates as a matter of law that the Plaintiffs' allegations fail to state a claim of action based upon the violation of any right guaranteed by the United States Constitution or Federal Law pursuant to 42 U.S.C.S., Sec. 1983, and Defendant, City of Fort Worth, is entitled to judgment on the Third Claim for Relief based upon a claim of Federal right as a matter of law.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that the Order Granting Partial Summary Judgment is hereby set aside and that the Motion for Summary Judgment filed by the Defendant, City of Fort Worth, be and is hereby reconsidered and sustained as to all points and that Plaintiffs recover nothing by these causes of action.

SIGNED this 6th day of November, 1987.

/s/ Sidney C. Farrar Jr.
Judge Presiding

IN THE COURT OF APPEALS FOR THE
SECOND APPELLATE DISTRICT OF TEXAS

No. 2-88-015-CV

MARIE WOODARD and GERTIE CONNER SUITERS, in their Representative Capacities; BILLY DON MILTON, Individually and in his Representative Capacities; JAMES RUNSHEIMER, Administrator; and BILLY RAY JOHNSON, DALE RAY HOWARD, ORON MURPHY, BEVERLY BEATRICE ALLEN, EDWARD LEE ALLEN, Individually

vs.

CITY OF FORT WORTH

From the 153rd District Court
Tarrant County (153-77312-83)

November 10, 1988
Opinion by Justice Lattimore (NFP)

JUDGMENT

This cause came on to be heard on the transcript of the record and the same having been reviewed it is the opinion of the court that there was no error in the judgment. It is ordered, adjudged and decreed that the judgment of the trial court in this cause be and it is hereby affirmed.

It is further ordered that appellant, Marie Woodard, Individually and as representative of each and all of the appellants herein, and the sureties, Lowell E. Dushman

and Jack Friedman, pay all costs in this behalf expended, for which let execution issue, and that this decision be certified below for observance.

/s/ [signature illegible]

AFFIRM.CV

IN THE COURT OF APPEALS FOR THE SECOND APPELLATE DISTRICT OF TEXAS

No. 2-88-015-CV

MARIE WOODARD and GERTIE CONNER SUITERS, in their Representative Capacities; BILLY DON MILTON, Individually and in his Representative Capacities; JAMES RUNSHEIMER, Administrator; and BILLY RAY JOHNSON, DALE RAY HOWARD, ORON MURPHY, BEVERLY BEATRICE ALLEN, EDWARD LEE ALLEN, Individually, Appellants

vs.

CITY OF FORT WORTH, Appellee

From the 153rd District Court of Tarrant County

OPINION

This is an appeal from a summary judgment for appellee, City of Fort Worth, ordering that appellants, Marie Woodard, Gertie Conner Suiters, Billy Don Milton, Billy Ray Johnson, Dale Ray Howard, Oron Murphy, James Runsheimer, Beverly Beatrice Allen, and Edward Lee Allen ("Woodard") take nothing. Woodard has perfected this appeal from the summary judgment.

We affirm.

Billy Don Milton was the proprietor of the Homestyle Cooking Restaurant. In October, 1980 a City of Fort Worth fire inspector inspected the restaurant. The fire inspector did not notice an underground propane tank.

In fact, the underground tank was located within ten feet of the building in violation of the fire code. Milton used a portable aboveground propane tank to supply propane to the restaurant, but the portable tank required frequent refilling. In December, 1981 Milton asked his landlord if he could use the larger underground tank, and the landlord said there should be no problem because the whole building had been inspected. Milton called Propane Bottle Service Company to fill the underground tank. When they tried to fill the underground tank, gas escaped from the tank and filtered into the restaurant. The restaurant exploded, and several people were killed or injured. Milton's sister, Peggy Ann Milton, was killed in the explosion, and Marie Woodard is the guardian of Peggy's children and coadministratrix of Peggy's estate. Woodard sued the City claiming the City was liable due to their failure to inspect the underground tank. Fort Worth filed a motion for summary judgment claiming governmental immunity. The court granted the motion and ordered Woodard take nothing against Fort Worth.

Woodard raises ten points of error. In her first six points of error, Woodard alleges different bases of common law liability. In her seventh and eighth points of error, Woodard contends Fort Worth is liable under the Texas Tort Claims Act, Texas Civil Practices and Remedies Code Annotated section 101.021 (Vernon 1986); and 42 United States Code section 1983. In her ninth point of error, Woodard contends the trial court erred in granting summary judgment because there are substantial issues that remain for the trier of fact. Finally, Woodard asks this court to abolish the doctrine of sovereign immunity as to all operational activities of a city.

In a summary judgment case, the issue on appeal is whether the movant met his burden for summary judgment by establishing that there exists no genuine issue of material fact and that he is entitled to judgment as a matter of law. *City of Houston v. Clear Creek Basin Authority*, 589 S.W.2d 671, 678 (Tex. 1979); TEX. R. CIV. P. 166a. The burden of proof is on the movant, and all doubts as to the existence of a genuine issue as to a material fact are resolved against him. *Great American Reserve Ins. Co. v. San Antonio Plumbing Supply Co.*, 391 S.W.2d 41, 47 (Tex. 1965). Therefore, we must review the evidence in the light most favorable to the nonmovant. *See id.* In deciding whether there is a material fact issue precluding summary judgment, all conflicts in the evidence will be disregarded and the evidence favorable to the nonmovant will be accepted as true. *Montgomery v. Kennedy*, 669 S.W.2d 309, 311 (Tex. 1984); *Farley v. Prudential Ins. Company*, 480 S.W.2d 176, 178 (Tex. 1972). Every reasonable inference from the evidence must be indulged in favor of the nonmovant and any doubts resolved in his favor. *Montgomery*, 669 S.W.2d at 311. Evidence which favors the movant's position will not be considered unless it is uncontroverted. *Great American*, 391 S.W.2d at 47.

Woodard's first seven points of error concerning common law liability and the Texas Tort Claims Act are controlled by *City of Denton v. Van Page*, 701 S.W.2d 831 (Tex. 1986). In *Van Page*, the plaintiff attempted to recover from the City of Denton because the fire inspector failed to discover some five-gallon gas cans in a storage building. *Id.* at 833. The court noted the Texas Tort Claims Act does not create any new duties, but merely

waives governmental immunity. *Id.* at 834. The court then held Denton would not be liable because a private person similarly situated would not be liable.

> Ordinarily a person who does not own the real property must assume control over and responsibility for the premises before there will be liability for a dangerous condition existing on the real property. It is possession and control which generally must be shown as a prerequisite to liability. 62 Am.Jur.2d *Premises Liability* [secs.] 12 and 14 (1972). Additionally, a private person who has created the dangerous condition may be liable even though not in control of the premises at the time of injury. *Strakos v. Gehring*, [360 S.W.2d 787, 790 (Tex. 1962)]. Also, a private person who agrees to make safe a known, dangerous condition of real property may be liable for the failure to remedy the condition. *Gundolf v. Massman-Johnson*, [484 S.W.2d 555, 556 (Tex. 1972) (per curiam opinion refusing writ, n.r.e.)].
>
> [6] The conduct of the City of Denton does not satisfy any of these circumstances. The City of Denton did not exercise control over the storage building, nor did it expressly or impliedly contract to remedy any dangerous condition on the property. The fire marshal did not create the dangerous condition, not did he promise to find and remedy any unsafe condition in the building, nor did he promise to make the storage building safe from arson. We hold that the City of Denton is not liable for the dangerous condition of the storage building because it neither owned, occupied nor controlled the premises, nor did it create the dangerous condition.

Id. at 835. Therefore, the court's decision in *Van Page* was not based on the doctrine of governmental immunity. Instead, the court held that Denton did not owe a duty to

the plaintiff and did not need to claim governmental immunity. The facts of *Van Page* are almost indistinguishable from the instant case. In her brief, Woodard argues we should adopt the reasoning of Justice Kilgarlin's concurring opinion in *Van Page*. Justice Kilgarlin argued Texas should adopt the rule stated in the *RESTATEMENT (SECOND) OF TORTS* section 324A (1965), which provides expanded liability for persons who render services necessary for the protection of property. The majority in *Van Page* declined to adopt section 324A; we are guided by that decision. Accordingly, Woodard's first seven points of error are overruled.

In her eighth point of error, Woodard contends the City's negligent inspection practices are actionable under 42 United States Code section 1983. The constitutional rights protected by section 1983 are not implicated by a *negligent* governmental act. *Danials v. Williams*, 106 S.Ct. 662, 663 (1986). Woodard has not cited any authority to support the proposition that the alleged negligence in this case is of constitutional dimension. Accordingly, Woodard's eighth point of error is overruled.

In her ninth point of error, Woodard contends "there are substantial issues that remain for the trier of fact." As discussed above, Woodard, as a matter of law, does not have a cause of action. Therefore, the contested facts are not material. Accordingly, Woodard's ninth point of error is overruled.

In her tenth point of error, Woodard asks this court to abolish the doctrine of governmental immunity as to all operational activities of the City. Under *Van Page*, we do not reach the issue of governmental immunity because

Woodard has not stated a cause of action. Accordingly, Woodard's tenth point of error is overruled.

Judgment affirmed.

/s/ Hal M. Lattimore
Justice

PANEL A
BURDOCK, FARRIS, AND LATTIMORE, JJ.
DO NOT PUBLISH
TEX. R. APP. P. 90(e)
NOV 10 1988

SUPREME COURT OF TEXAS
P.O. Box 12248
Supreme Court Building
Austin, Texas 78711
John T. Adams, Clerk

June 21, 1989

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RE: Case No. C-8289

STYLE: MARIE WOODARD ET AL.
v. CITY OF FORT WORTH

Dear Counsel:

Today, the Supreme Court of Texas denied the above referenced application for writ of error with the notation, Writ Denied.

Respectfully yours,
John T. Adams, Clerk
By /s/ Blanca E. Morin
Deputy

SUPREME COURT OF TEXAS
P.O. Box 12248
Supreme Court Building
Austin, Texas 78711
John T. Adams, Clerk

September 13, 1989

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RE: Case No. C-8289

STYLE: MARIE WOODARD ET AL.
v. CITY OF FORT WORTH

Dear Counsel:

Today, the Supreme Court of Texas overruled petitioner's motion for rehearing of the application for writ of error in the above styled case.

Respectfully yours,
John T. Adams, Clerk
By /s/ Blanca E. Morin
Deputy

IN THE SUPREME COURT
OF THE STATE OF TEXAS

No. C-8289

MARIE WOODARD, ET AL, Appellant

vs.

CITY OF FORT WORTH, Appellee

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

Notice is hereby given that Marie Woodard; Sherry L. Milton, minor; Tonya M. Milton, minor; Sara J. Fletcher, minor; The Estate of Peggy Ann Milton, deceased; Gertie Conner Suiters; Dionne M. Milton, minor; Frankie G. Milton; minor; Billy Don Milton; Estate of Sara Jane Milton, Freida Mosley Milton, minor; Don Milton, minor; Latoya Milton, minor; Billy Ray Johnson; Dale Ray Howard; Oron Murphy; James Runsheimer, Guardian and Administrator; Cornetta Allen, N.C.M.; The Estate of Elizabeth Allen, deceased; Beverly Beatrice Allen; Edward Lee Allen, hereby appeal to the Supreme Court of the United States by way of application for writ of certiorari from the judgment of the Supreme Court of the State of Texas affirming the summary judgment of the trial Court and affirmance thereof by the Court of Appeals below, which final judgment was entered in this action by the Supreme Court of Texas on September 13, 1989.

This appeal is taken pursuant to 28 U.S.C.S., Section 1257(3).

Respectfully submitted,

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817-834-8851

By: /s/ Jack Friedman
STATE BAR NO. 07466500
ATTORNEY FOR
APPELLANT

CERTIFICATE OF SERVICE

A copy of the Notice of Appeal has been mailed on this 11th day of October, 1989, to all counsel of record, via certified mail, return receipt requested.

/s/ Jack Friedman

IN THE DISTRICT COURT
OF TARRANT COUNTY,
TEXAS 153RD JUDICIAL DISTRICT

No. 153-77312-83

MARIE WOODARD, ET AL

VS.

CITY OF FORT WORTH

PLAINTIFFS' THIRD AMENDED ORIGINAL PETITION

TO THE HONORABLE JUDGE OF SAID COURT:

Now come MARIE WOODARD in her representative capacities, GERTIE CONNER SUITERS in her representative capacities, BILLY DON MILTON, Individually and in his representative capacities, BILLY RAY JOHNSON, Individually, DALE RAY HOWARD, Individually, ORON MURPHY, Individually, JAMES RUNSHEIMER, Administrator, BEVERLY BEATRICE ALLEN, Individually and EDWARD LEE ALLEN, Individually and file this their Plaintiffs' Third Amended Original Petition, and as grounds therefor, would respectfully show unto the court and jury as follows:

A. MARIE WOODARD appears in the following representative capacities:

1. As Guardian of the Estates and Persons of three of the minor children and survivors of PEGGY ANN MILTON, Deceased, as follows:

(a) Sherry L. Milton
(b) Tonya M. Milton
(c) Sara J. Fletcher

2. As Co-Administrator of the Estate of PEGGY ANN MILTON, Deceased.

3. In all capacities authorized by law, including under The Texas Survival Statute, Texas Civil Practices and Remedies Code, Section 71.021, and the Wrongful Death Statute, Texas Civil Practices and Remedies Code, Section 71.001, et. seq.

4. Jointly, with GERTIE CONNER SUITERS, for all heirs both known and unknown of PEGGY ANN MILTON, Deceased.

B. GERTIE CONNER SUITERS appears in the following representative capacities:

1. As Guardian of the Estates and Person of two of the minor children and survivors of PEGGY ANN MILTON, Deceased, as follows:

(a) Dionne M. Milton
(b) Frankie G. Milton

2. As Co-Administrator of the Estate of PEGGY ANN MILTON, Deceased.

3. In all capacities authorized by law, including under The Texas Survival Statute, Texas Practices and Remedies Code, Section 71.021, and the Wrongful Death Statute, Texas Civil Practices and Remedies Code, Section 71.001, et seq.

4. Jointly, with Marie Woodard, for all heirs both known and unknown of PEGGY ANN MILTON, Deceased.

C. BILLY DON MILTON appears in the following capacities:

1. Individually and in his own right;
2. As next friend for the surviving minor children of himself and SARA JANE MILTON, Deceased, to-wit:

   (a) Freida Mosley Milton
   (b) Don Milton
   (c) La oya Milton

3. As community survivor and heir at law of his wife, SARA JANE MILTON, Deceased, killed as a result of the incident made the basis of this lawsuit.
4. In behalf of the Estate of SARA JANE MILTON, Deceased.
5. In all capacities authorized by law, including under The Texas Survival Statute, Texas Civil Practices and Remedies Code, Section 71.021, and the Wrongful Death Statute, Texas Civil Practices and Remedies Code, Section 71.001, et seq.
6. For all heirs both known and unknown of SARA JANE MILTON, Deceased.

D. BILLY RAY JOHNSON appears Individually and in his own right.

E. DALE RAY HOWARD appears Individually and in his own right.

F. ORON MURPHY appears Individually and in his own right.

G. JAMES RUNSHEIMER appears in the following representative capacities:

1. As guardian of the Estate of CORNETTA ALLEN, N.C.M., a surviving child and heir of ELIZABETH ALLEN, Deceased.

2. As Administrator of the Estate of ELIZABETH ALLEN, Deceased.

3. In all capacities authorized by law, including under The Texas Survival Statute, Texas Civil Practices and Remedies Code, Section 71.021, and the Wrongful Death Statute, Texas Civil Practices and Remedies Code, Section 71.001, et seq.

4. For all heirs both known and unknown of ELIZABETH ALLEN, Deceased.

H. BEVERLY BEATRICE ALLEN appears Individually and in her own right as an adult child and heir along with EDWARD LEE ALLEN and CORNETTA ALLEN, N.C.M., of ELIZABETH ALLEN, Deceased and her Estate.

I. EDWARD LEE ALLEN appears Individually and in his own right as adult child and heir, along with BEVERLY BEATRICE ALLEN and CORNETTA ALLEN, N.C.M., of ELIZABETH ALLEN, Deceased and her Estate

This suit is brought by the above-named Plaintiffs in the above-mentioned capacities, as Co-Plaintiffs against THE CITY OF FORT WORTH, Tarrant County, Texas, and for cause of action Plaintiffs would show unto the Court as follows:

First Claim for Relief – Common Law Cause of Action Under Proprietary Function

1.

All Plaintiffs live and reside in Fort Worth, Tarrant County, Texas. Defendant, CITY OF FORT WORTH, is a municipality which has made its appearance herein for all purposes.

2.

Plaintiffs bring this action against the CITY OF FORT WORTH under the common law of the State of Texas for certain negligent acts or omissions in the performance of proprietary functions of the CITY OF FORT WORTH by authorized agents, servants or employees in the course and scope of their employment with the CITY. Further, these Plaintiffs bring this action pursuant to Texas Civil Practices and Remedies Code, Section 71.001, et seq., commonly known as the Wrongful Death Statute as well as Texas Civil Practices and Remedies Code, Section 71.021, the Survival Action. Plaintiffs would show that the Defendant had actual notice at or near the time of the occurrence in issue as to the occurrence and the injuries and deaths which resulted therefrom. Additionally, these Plaintiffs have given written notice of these claims to the Defendant, CITY OF FORT WORTH, in due time and form. Accordingly, all conditions precedent to maintaining this cause of action and recovery therefor have been performed or otherwise satisfied.

3.

Plaintiff would show that a restaurant business known as The Homestyle Cooking Restaurant had been established and was operating at the premises located on Angle Avenue within the city limits of the City of Fort Worth, Tarrant County, Texas. Prior to the opening of this restaurant business, the Defendant, CITY OF FORT WORTH, was called upon to conduct certain inspections and issue certifications of occupancy in order to permit the opening and continued operation of such restaurant business.

Plaintiffs would show that the Defendant CITY OF FORT WORTH on one or more occasions prior to the explosion and fire giving rise to this lawsuit, inspected the premises in issue and certified them to be safe and fit to be occupied safely. Further, Plaintiffs would show that as a part of the inspection, the CITY OF FORT WORTH, acting through its agents, servants or employees, purported to inspect an underground liquefied petroleum gas tank located on the restaurant premises. Such inspection, insofar as it was or purported to be an inspection of a gas system, took on the character of a proprietary function, which, by law, subjected the CITY OF FORT WORTH to liability under the common law for any negligent act or omission during such inspection. Plaintiffs would further show that having undertaken to conduct such investigation and inspection, the CITY OF FORT WORTH was under the obligation to act with ordinary care and may not then characterize such negligence on its part as merely "governmental" in order to avoid its liability.

Plaintiffs would show that the underground tank was in fact at all material times in an extremely unsafe condition in that it had holes in it, the connections and pipes attached to it were not connected properly, and it was located within ten feet of the building line. Each of these conditions violated applicable safety requirements of the LPG division of the Texas Railroad Commission and the safety ordinances of the City of Fort Worth and should have been discovered by Defendant. Defendant should then have warned against use or prevented the tank from being used. Notwithstanding such unsafe condition, the container received the obvious approval by the City of Fort Worth on each inspection. On or about the 23rd day of December, 1981, in reliance upon such certification by the Defendant, an LPG delivery truck was called to fill the tank. During such filling process, and by reason of the defective condition of the tank, the gas leaked out underground, flowing into the restaurant where it exploded and burned, causing the injuries and deaths which will be described later.

4.

The Defendant, CITY OF FORT WORTH, acting through its authorized agents, servants or employees, in the course and scope of their employment with the CITY, was guilty of the following acts or omissions, each of which was negligence and each a proximate cause of the explosion and fire and the resulting injuries and death, each of which acts of omission occurred in Fort Worth, Tarrant County, Texas, to-wit:

a. In failing to properly inspect the tank, piping or the system or appliance prior to the incident in issue;

b. In failing to discover the dangerous condition of the tank, piping or system prior to the incident in issue;

c. In failing to conduct a reasonable inspection of the location and condition of the tank, piping, system or appliance of which it is a part, in order to discover the condition of same;

d. In holding out that an inspection of all plumbing, gas, and other systems had been conducted, when in fact, the tank in issue had not been inspected, or if inspected, had not been properly inspected;

e. In holding out by such inspection and certificates that the existing underground tank installation was reasonably safe and had been approved by the City of Fort Worth;

f. In failing to "red-tag" or give notice the underground tank in issue was not reasonably safe.

5.

Plaintiffs would show that the conduct of the Defendant through its authorized agents, servants or employees acting in the course and scope of their employment with the CITY OF FORT WORTH, and in furtherance of a proprietary function of the CITY OF FORT WORTH, was a proximate cause of the explosion, and fire which followed, and of the resulting injuries and death of SARA JANE MILTON, PEGGY ANN MILTON and ELIZABETH ALLEN, as well as the severe burn injuries to BILLY RAY JOHNSON and the injuries to DALE RAY HOWARD and ORON MURPHY. By operation of law and by reason of such negligence while performing proprietary functions, or at least in performing mixed functions, those which are both proprietary

and governmental in nature, the CITY OF FORT WORTH is liable to these Defendants for the negligent acts above described, and for the resulting damages to each of the Plaintiffs as follows:

A. As to the heirs and estate of PEGGY ANN MILTON, Deceased:

1. Conscious pain and suffering of PEGGY ANN MILTON from the time of the explosion and fire until her resulting death on January 4, 1982 in the amount of $750,000.00;

2. Funeral and burial expenses in the amount of $2,500.00.

B. As to the surviving minor children of PEGGY ANN MILTON, Deceased:

1. Mental grief and anguish of each child (past, present and future) in the amount of $150,000.00 for each of them.

2. Loss of the care, maintenance, support, services, education, advice, counsel, and contributions of pecuniary value that each of such children would in reasonable probability have received from Decedent during her lifetime, had she lived, in the amount of $100,000.00 each.

C. As to the heirs and estate of SARA JANE MILTON, Deceased:

1. Conscious pain and suffering of SARA JANE MILTON, at the time of the explosion and fire and as she burned to death in the amount of $500,000.00.

2. Funeral and burial expenses in the amount of $2,500.00.

D. As to the surviving minor children of SARA JANE MILTON, Deceased:

1. Mental grief and anguish of each child (past, present and future) in the amount of $150,000.00 for each of them.

2. Loss of the care, maintenance, support, services, education, advice, counsel and contributions of pecuniary value that each of such children would in reasonable probability have received from Decedent during her lifetime, had she lived, in the amount of $100,000.00 each.

E. As to BILLY DON MILTON, Individually:

1. Mental grief and anguish. (In this respect, Plaintiff Milton would show, in part, that he was present at the time of the death of his wife and was a witness to the tragic and terrifying occurrence) in the amount of $250,000.00.

2. Loss of the care, maintenance, support, services, advice, counsel and contributions of pecuniary value that he would in reasonable probability have received from his beloved wife, SARA JANE MILTON, the Deceased, in the amount of $250,000.00.

3. Loss of consortium and non-pecuniary damages in the amount of $250,000.00.

BILLY DON MILTON is 33 years old with a life expectancy of at least 38 years at the time of the filing of this petition. His wife, Sara was 29 years old at the time she died, with a life expectancy of at least 46 years. PEGGY ANN MILTON was 27 years old at the time of her death, with a life expectancy of at least 48 years.

F. As to the heirs and estate of ELIZABETH ALLEN, Deceased:

1. Conscious pain and suffering of ELIZABETH ALLEN at the time of the explosion and fire and as she burned to death in the amount of $500,000.00.

2. Funeral and burial expenses in the amount of $2,500.00.

G. As to the surviving adult son of ELIZABETH ALLEN, BEVERLY BEATRICE ALLEN, and CORNETTA ALLEN, N.C.M., surviving daughters of ELIZABETH ALLEN, Deceased:

1. Mental grief and anguish of each child (past, present and future) in the amount of $150,000.00 for each of them.

2. Loss of the care, maintenance, support, services, education, advice, counsel and contributions of pecuniary value that each of such children would in reasonable probability have received from Decedent during her lifetime, had she lived, in the amount of $100,000.00 each.

ELIZABETH ALLEN was 42 years old at the time of her death, with a life expectancy of at least 33 years.

H. As to BILLY RAY JOHNSON, Individually:

1. Physical pain and mental anguish (past, present and future) in the amount of $450,000.00.

2. Physical disfigurement (past, present and future) in the amount of $50,000.00.

3. Humiliation (past, present and future) in the amount of $25,000.00.

4. Reasonable and necessary medical expenses incurred to date of trial for treatment of his severe burns and injuries in the amount of $60,000.00.

5. Reasonable and necessary medical expenses which he will, in reasonable probability, require in the future for treatment of his severe burns and injuries in the amount of $25,000.00.

6. Loss of earnings and/or earning capacity (past, present and future) in the amount of $250,000.00.

7. Loss of use of the affected areas of his body, not included in the above in the amount of $100,000.00.

BILLY RAY JOHNSON is 37 years old with a life expectancy of at least 35 years, at the time of the filing of this petition.

I. As to DALE RAY HOWARD, Individually:

1. Physical pain and mental anguish (past, present and future) in the amount of $150,000.00.

2. Reasonable and necessary medical expenses incurred to date of trial for treatment of his injuries in the amount of $15,000.00.

3. Reasonable and necessary medical expenses which he will, in reasonable probability, require in the future for treatment of his injuries in the amount of $10,000.00.

4. Loss of earning capacity (past and future) in the amount of $50,000.00.

DALE RAY HOWARD is 36 years of age with a life expectancy of at least 36 years, at the time this petition is filed.

J. As to ORON MURPHY, Individually:

1. Physical pain and mental anguish (past, present and future) in the amount of $100,000.00.

2. Reasonable and necessary medical expenses incurred to date of trial for treatment of his injuries in the amount of $2,500.00.

3. Reasonable and necessary medical expenses which he will, in reasonable probability, require in the future for treatment of his injuries in the amount of $1,500.00.

ORON MURPHY is 53 years of age with a life expectancy of at least 22 years, at the time this petition is filed.

All references in this petition to life expectancy are derived from the "Vital Statistics of the United States, 1977, Life Tables," published by the U.S. Department of Health, Education and Welfare. Plaintiffs hereby give notice that they will introduce into evidence at the time of trial, these life tables, or the most recently published ones.

WHEREFORE, PREMISES CONSIDERED, Plaintiffs pray that the Defendant, CITY OF FORT WORTH, be cited to appear and answer herein, and that upon a final trial, Plaintiffs have judgment against the Defendant for their respective damages as above set forth, costs of court, legal interest as provided by law, and for such other and further relief, special and general,

to which Plaintiffs may each be entitled, whether at law or in equity.

Second Claim for Relief – Texas Tort Claims Action

6.

Come now the Plaintiffs in their respective capacities as alleged above in their First Claim for Relief and adopt the pleadings and allegations set out therein as though fully set forth in this portion of their Plaintiffs' Third Amended Original Petition and would further show as follows:

7.

If it be shown that Defendant's wrongful conduct in issue is not to be characterized in whole or in part as "proprietary" in nature, Plaintiffs would show that such functioning should be characterized as "governmental" and therefore, Plaintiffs bring this action, alternatively, under the Texas Tort Claims Act, Texas Civil Practices and Remedies Code, Section 101.001 et seq. Plaintiffs would show in this connection that proper and timely notice has been given to Defendant, who, in any event had actual notice of the occurrence and the injuries and deaths which proximately resulted therefrom. All conditions precedent to the maintenance of this cause and recovery herein have been performed or otherwise satisfied.

8.

Plaintiff would show that the Defendant, CITY OF FORT WORTH, acting through its agents, servants, employees and/or officers, was guilty of acts or omissions

constituting negligence involving the use or condition of property and that such acts or omissions were a proximate cause of the occurrence in issue and resulting injuries and deaths, and that such acts or omissions occurred in Tarrant County, Texas. The CITY OF FORT WORTH, undertook, gratuitously or for consideration to inspect the premises involved in this litigation. At the time that such services were rendered and until the explosion which caused the injuries and deaths, the CITY OF FORT WORTH recognized that its inspection of such property was necessary for the protection of those persons who would be in or around the premises. Plaintiff would show that the CITY OF FORT WORTH's failure to exercise reasonable care in undertaking the inspection increased the risk of harm to those persons who would be in or around the premises, in that, the underground tank would not have been used had it been discovered or inspected by the CITY OF FORT WORTH and therefore would never have been used and would not have exploded. Alternatively, it will be shown that all persons on the premises of the restaurant at the time of the explosion relied upon the expertise of the CITY OF FORT WORTH in the inspection that it performed and in issuing the certificate that the premises were safe to be used. Consequently, by operation of the law of the State of Texas and Section 324A of the Restatement (2nd) of Torts (1965) the CITY OF FORT WORTH is liable to these Plaintiffs for all damages that have resulted from its negligence.

9.

Plaintiff would further show that such negligence proximately caused the occurrence in issue, the resulting

injuries and deaths and the damages set out above, in Plaintiffs' First Claim for Relief and which are adopted herein as though fully set forth. Therefore, the Plaintiffs should recover of and from the Defendant their damages as plead, pursuant to Texas Civil Practices and Remedies Code, Section 101.001, et seq., the Texas Tort Claims Act.

WHEREFORE, PREMISES CONSIDERED, Plaintiffs pray in the alternative, that Defendant be cited to appear and answer herein, and that upon a final trial, Plaintiffs have judgment against the Defendant for their respective damages, pursuant to and as limited by Article 6252-19, Revised Civil Statutes, for costs of court, legal interest, and for such other and further relief, special or general, to which Plaintiffs may be entitled, whether at law or in equity.

Third Claim for Relief – Federal Right

10.

Now come the Plaintiffs in their respective capacities as alleged above in their First Claim for Relief and adopt the pleadings and allegations set out therein as though fully set forth in this portion of their Plaintiffs' Third Amended Original Petition and would additionally allege this federal right or cause of action. Plaintiffs bring this federal cause of action pursuant to 42 U.S.C.S., Sec. 1983. At all times relevant hereto the Defendant, and its agents, servants, employees or officers were acting under color of law in their official capacity with the Defendant and within the course and scope of their official duties.

11.

Plaintiffs would show that Defendant, the CITY OF FORT WORTH had taken on responsibility for fire safety and building inspection for its citizens by a program of inspection of business premises to determine whether there were any hazards or conditions which existed that rendered the premises unsafe and/or unlawful for occupancy. The public, and in particular, the occupants of the building had the right to rely upon and in fact did rely upon the claimed expertise of the City's agents in conducting adequate and timely inspection.

12.

The last inspection of these premises had been conducted by the Defendant in November of 1980. Despite the obvious presence of the underground liquid petroleum gas tank within ten feet of the building, Defendant permitted the building to pass inspection. A reasonably diligent inspection would have disclosed the presence of such condition either then, or within the six month required reinspection. Defendant acknowledges that it did not discover the condition during the inspection it made. Plaintiff would further show that a reinspection was never carried out. The location and condition of the tank was extremely dangerous and should not have been approved by the Defendant. Certainly this highly dangerous condition should have been discovered by the Defendant and remedied prior to the explosion involved in this lawsuit.

13.

Plaintiffs would further show that the Defendant's failure to discover this condition, as described above, directly results from a long standing policy and pattern of persistent and inadequate inspection practices sufficiently known to and either approved or acquiesced to by the fire and building inspection department's chief and/or assistant chiefs so long that it took on the character of official policy. Plaintiffs would show that, in that regard, that there is little, if any, practical training conducted by or for the CITY OF FORT WORTH in order to qualify or test the qualification of its inspectors. Nor does the CITY OF FORT WORTH verify, check or assure the competency and safety of such inspections. The Defendant knew that such inspections were inadequate and even now admits that they were too infrequent, but consciously ignored the constant threat to human life and property that such inadequacies created. It was the inevitable and foreseeable consequence of such heedless conduct authorized and later specifically approved by the department chief that the explosion that gives rise to this lawsuit occurred. Those persons killed are deprived of the most precious right guaranteed by the Constitution, the right to life. As guaranteed particularly by the Fifth and Fourteenth Amendments under the Constitution and 42 U.S.C.S., Sec. 1983. Those injured are deprived of the liberty to move, walk, work, and live a life free from the restrictions placed upon them by their injuries. Those damaged by the loss of their loved ones have been deprived not only of the pecuniary support they would have received, but also of the less tangible, but no less valuable benefits of care, love, solace, comfort and con-

sortium. This deprivation of constitutional rights, privileges or immunities is the direct and inexorable result of Defendant's failure to act in the fact of the pattern of persistent practices and inadequacies as previously set out.

14.

Plaintiffs would show that liquid petroleum gas is a highly volatile and dangerous substance. Inspection for defective conditions relating to such substance requires, as a matter of law, a very high standard of care by the CITY OF FORT WORTH. Its obvious failure to meet this standard evidences heedless disregard and conscious indifference to necessarily serious consequences, and by reason of such gross negligence, even a single such incident would give rise to liability, pursuant to 42 U.S.C.S., Sec. 1983. Plaintiffs would show that the inadequate inspection performed by the Defendant and its failure to reinspect properly reveal a conscious indifference to clear risk of death or serious bodily injury. The failure of the City adequately to train, supervise, discipline or to control its inspectors in the exercise of their inspection duties and their failure to enforce State and local law is further evidence of reckless disregard of such known and inevitable consequences. Plaintiffs pray accordingly that they be awarded their compensatory damages in an amount to be assessed by the jury and in keeping with the elements of damages which may be awarded pursuant to 42 U.S.C.S., Sec. 1983, as well as a reasonable attorney's fee incurred under such action.

WHEREFORE, PREMISES CONSIDERED, Plaintiffs pray that upon final hearing that they recover the amounts plead under common law, or alternatively the

amounts plead under the Texas Tort Claims Act. Further, Plaintiffs pray that they be awarded compensatory damages provided by 42 U.S.C.S., Sec. 1983, for costs of court, for legal interest, for reasonable attorney's fee under the Sec. 1983 action, all as set forth in their pleadings, and for such other and further relief to which they may be entitled, whether at law or in equity.

Respectfully submitted

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817-834-8851

By: /s/ Jack Friedman
Bar ID#: 07466500
ATTORNEY FOR
PLAINTIFF

CERTIFICATE OF SERVICE

The undersigned certifies that a copy of the foregoing instrument was served upon the attorneys of record of all parties in the above cause in accordance with the Texas Rules of Civil Procedure, on this ____ day of _____ , 1987.

/s/ Jack Friedman